Supreme Court, U. S.
FILED
AUG 22 1980
MICHAEL RODAK, JR., CLERK

No. 80-32

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CLIFFORD J. HYNNING,
Appellant,

v.

DUFIEF MORTGAGE, INC., *et. al.*,
Appellees,

On Appeal from the Supreme Court of Virginia

MOTION TO DISMISS

GRIFFIN T. GARNETT III
(counsel of record)
Attorney for Appellee, Dufief Mortgage, Inc.
GARNETT, KOSTIK & GARNETT
2000 North 16th Street
Arlington, Virginia 22216
(703) 522-6100

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

QUESTIONS PRESENTED

1. Whether *res judicata* and collateral estoppel preclude Appellant Hynning from bringing this appeal based on the issue of *in personam* jurisdiction over the partnership, when that issue has been decided adversely to Appellant Hynning in a prior case, between the same parties or their privies, that was before this Court on a Petition for Writ of Certiorari (denied March 20, 1978, Case No. 77-1044).

2. Assuming that Appellant Hynning is correct in his analysis that the issue is now one of subject matter jurisdiction, does the doctrine of *res judicata* and collateral estoppel preclude Appellant Hynning from bringing this appeal when that issue was tacitly, if not explicitly, determined in the first case and was determined adversely to Appellant Hynning by a Court with jurisdiction over the defendant and therefore the power to decide whether it had jurisdiction over the subject matter.

3. Whether the judgment below rests on an adequate non-federal basis, the doctrine of *res judicata* and collateral estoppel.

4. Whether the Virginia Statute allowing service of process on one partner to give the Court jurisdiction of the partnership is Constitutional under Section I of the Fourteenth Amendment to the Constitution of the United States.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 2

ARGUMENT 3

1. *Res judicata* and collateral estoppel apply to preclude Appellant Hynning from bringing this appeal based on the issue of lack of *in personam* jurisdiction when that issue has been decided adversely to Appellant Hynning in a prior case. 3

2. Assuming that Appellant Hynning is correct in his analysis that the issue is now one of subject matter jurisdiction, *res judicata* and collateral estoppel apply to preclude Appellant Hynning from bringing this appeal when that issue was tacitly, if not explicitly, determined in the first instance, and was determined adversely to Appellant by a court with jurisdiction over the defendant and therefore the power to decide whether it had jurisdiction over the subject matter 6

3. The judgment below rests on an adequate non-federal basis, *res judicata* and collateral estoppel. 8

4. The Virginia Statute allowing service of process on one partner to give the court jurisdiction of the partnership is Constitutional under Section 1 of the Fourteenth Amendment to the Constitution of the United States 9

CONCLUSION 13

CERTIFICATE OF SERVICE 14

PREVIOUS PAGE WAS BLANK

TABLE OF AUTHORITIES

Page

Cases

American Surety Co. v. Baldwin,
287 U.S. 156 (1932) 5

Beals v. Cone,
188 U.S. 184 (1903) 9

Bogley, Harting, Mahoney & Lebling, Inc. v. The Caravel Office Building Company
Law No. 18633 ..... 2, 3

Caravel Office Building Company and Clifford J. Hynning v. Bogley, Harting, Mahoney & Lebling, Inc.,
Case No. 77-1044 ..... 3, 10

Chicago, Milwaukee, St. Paul and Pacific Railroad Company v. United States,
585 F.2d 254 (7th Cir., 1978) 7

Chicot County Drainage District v. Baxter State Bank,
308 U.S. 371 (1940) 6, 7

Cooper v. Reynolds,
77 U.S. 308 (1870) 4

Deane Hill Country Club, Inc. v. City of Knoxville,
379 F.2d 321 (6th Cir., 1967) 9

Diamond National Corp. v. Thunderbird Hotel, Inc.,
85 Nev. 271, 454 P.2d 13 (1969) 11

Fidelity and Casualty Company of New York v. Homan,
(Fla. App. 1959) 116 So.2d 444 ..... 11, 12

Great Southern Fire Proof Hotel Company v. Jones,
177 U.S. 499 (1900) 10

Grubb v. Public Utilities Commission,
281 U.S. 470 (1930) 6

Page

Hibou v. Ramsing,
(Del. Super, 1974), 324 A.2d 777 11

International Shoe Company v. State of Washington,
326 U.S. 310 (1945) 12

Jackson v. Irving Trust Co.,
311 U.S. 494 (1941) 6, 7

McCormick v. Romans,
214 Va. 144, 198 S.E.2d 651 (1973) 9, 10

Milliken v. Meyer,
311 U.S. 457 (1940) 13

Pennoyer v. Neff,
25 U.S. 714 (1878) 12

Shaffer v. Heitner,
433 U.S. 186 (1977) 12

Stoll v. Gottlieb,
305 U.S. 165 (1938) 6, 7, 8

Sugg v. Thornton,
132 U.S. 524 (1889) 10, 11

The City and County of San Francisco v. Itsell,
133 U.S. 65 (1890) 9

CONSTITUTIONAL PROVISIONS
AND STATUTES

United States Constitution
Fourteenth Amendment (Due Process Clause) 4, 9

Section 8-59.1, Code of Virginia (1950), as amended 10

Section 50-6, Code of Virginia (1950), as amended 9

Page

MISCELLANEOUS

60 *Am. Jur.* 2d, Partnerships, Sections 322, 323 and 330 ....9, 10, 11

62 *Am. Jur.* 2d, Process, Section 69 13

126 ALR 1474 13

American Law Institute,
Restatement: Judgments 7, 8

7 *Moore's Federal Practice*, 60.25 [2] (2nd ed., 1978) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-32

CLIFFORD J. HYNNING,
Appellant,

v.

DUFIEF MORTGAGE, INC., *et. al.*,
Appellees,

On Appeal from the Supreme Court of Virginia

MOTION TO DISMISS

Appellee, Dufief Mortgage, Inc., pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves the Court to dismiss this appeal on the following grounds:

1. That the Appellant is precluded from bringing this appeal by the doctrine of *res judicata* and collateral estoppel;

2. That the judgment below rests on an adequate non-federal basis;

3. That the question is so unsubstantial as not to warrant further argument.

STATEMENT OF THE CASE

The Supreme Court of Virginia is clearly correct in denying the Appellant's Petition for Appeal. This cause rests on a Creditor's bill filed by the Appellee, Dufief Mortgage, Inc. (hereinafter Dufief) in the Circuit Court of Arlington County in Chancery No. 28334 to enforce an earlier judgment of that Court on a debt of Appellant, Clifford Hynning (hereinafter Hynning). The Arlington Circuit Court by opinion on March 27, 1979, ruled in favor of Dufief and held that Hynning was barred from raising the issue of the validity of the original judgment by the doctrine of *res judicata* and collateral estoppel. The Court held that the issue of jurisdiction had been determined in the original case and could not be raised again in this action. Hynning's Petition for Appeal in this case was denied by the Supreme Court of Virginia on April 10, 1980.

The Creditor's bill is based on a judgment entered January 14, 1977, by the Circuit Court of Arlington County, Virginia, in a case styled *Bogley, Harting, Mahoney & Lebling, Inc., A Maryland Corporation v. the Caravel Office Building Company, A District of Columbia Partnership, et. als.*, at Law No. 18633, against the defendant partnership and one of the partners, Hynning. Bogley, Harting, Mahoney & Lebling, Inc. is now known as Dufief Mortgage, Inc. In that suit, *Bogley* brought action on a delinquent partnership promissory note and obtained judgment thereon. The District of Columbia partnership had conducted no business in the State of Virginia and service of process was obtained on both the partnership and Hynning at the personal residence of Hynning in Arlington County pursuant to Section 8-59.1, Code of Virginia (1950) as amended.

Hynning's Petition for Appeal to the Supreme Court of Virginia was denied by memorandum judgment on October 25, 1977. This Court denied Hynning's Petition for Writ of Certiorari on March 20, 1978. (*Caravel Office Building Company and Clifford J. Hynning v. Bogley, Harting, Mahoney & Lebling, Inc., Case No. 77-1044*). The Creditor's bill, which is the subject of this appeal, seeks to enforce that earlier judgment by sale of Hynning's personal residence.

ARGUMENT

1. *Res Judicata* and collateral estoppel apply to preclude Appellant Hynning from bringing this appeal based on the issue of lack of *in personam* jurisdiction when that issue has been decided adversely to Appellant Hynning in a prior case.

Hynning's argument throughout these two proceedings has been that the Arlington County Circuit Court lacked jurisdiction over the District of Columbia partnership and thus the judgment in the original case is void. He made that argument in the first case and lost in the Arlington Circuit Court, the Virginia Supreme Court and his Petition for Writ of Certiorari to this Court was denied. Now he is making the same argument again in this case except that he is now saying that the original Court lacked subject matter jurisdiction, and that that issue was not litigated in the prior case. It is Dufief's contention that the exact same issue was presented in the *Bogley v. Hynning* case and decided adversely to Hynning. That is the position taken by the Arlington Circuit Court in its opinion of March 27, 1979 holding that Hynning was barred from raising this issue again. In that opinion, the Court held that "a careful reading of the able arguments presented in the prior case indicates that while the issue of subject matter jurisdiction

was not phrased in that precise term, the concepts asserted were identical." The first question presented by Hynning in the prior case is his Petition for Writ of Certiorari filed with this Court was:

> "1. Is the due process clause of the 14th Amendment to the Constitution of the United States violated if a forum state, without consent,
>
> a. exercised jurisdiction over a non-resident limited partnership without even any "minimal contacts" with the forum state?
>
> b. serves process on a non-resident partnership, without even any "minimal contacts" with the forum state at the personal residence (non-business) of one of the partners in the forum state?"

Hynning's present argument, that Virginia's statute authorizing service of process on a partnership is unconstitutional as a violation of due process is the exact same argument he made in the first case and Appellee contends he is barred by the doctrine of *res judicata* and collateral estoppel from raising it in this case even if he now labels the issue "subject matter jurisdiction and not *in personam* jurisdiction." It should be noted that Bogley is in privity with Dufief in the prior case.

This Court has defined subject matter jurisdiction as follows: "by jurisdiction over the subject-matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the Court, and is to be sought for in the general nature of its powers, or in authority specially conferred." *Cooper v. Reynolds*, 77 U.S. 308 (1870). The subject matter of the *Bogley v. Hynning* case was the debt owed by Hynning to Bogley; Hynning's personal obligation for the debt of his partnership. The Arlington Circuit Court is a

Court of general jurisdiction and is authorized to try cases concerned with the debt of a defendant residing within the Court's territorial jurisdiction. When Hynning now talks about Virginia's Service of Process statute on partnerships and concepts such as "minimum contacts" he is in reality talking about personal jurisdiction; the same issue that was litigated and decided adversely to Hynning in the prior case.

The doctrine of *res judicata* and collateral estoppel is that when parties have once litigated an issue it is concluded. The principles of *res judicata* and collateral estoppel apply to questions of jurisdiction as well as to other issues. (*American Surety Co. v. Baldwin* (1932), 287 U.S. 156, 166.) In the interest of finality, the concept of setting aside a judgment on voidness grounds is narrowly restricted. (7 *Moore's Federal Practice,* 60.25 [2] (2nd ed., 1978)). It is Dufief's contention that the doctrine of *res judicata* and collateral estoppel should apply to bar Hynning from once again litigating the issue of the Arlington Court's jurisdiction over the partnership.

2. Assuming that Appellant Hynning is correct in his analysis that the issue is now one of subject matter jurisdiction, *res judicata* and collateral estoppel apply to preclude Appellant Hynning from bringing this appeal when that issue was tacitly, if not explicitly, determined in the first instance, and was determined adversely to Appellant by a Court with jurisdiction over the defendant and therefore the power to decide whether it had jurisdiction over the subject matter.

It is Dufief's contention that even if Hynning is correct in now labelling the issue as one of subject matter jurisdiction the doctrine of *res judicata* precludes him from raising that issue on this appeal. This Court held in *Stoll v. Gottlieb*, 305 U.S. 165 (1938), that *res judicata* applied to a Court's determination of its jurisdiction over the subject matter when the issue had been litigated. In *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940), the Court went further, holding that explicit litigation of the jurisdictional issue was unnecessary. In *Chicot*, the Court suggests that there need only have been an opportunity to litigate the question. 308 U.S. at 378. This result was upheld in *Jackson v. Irving Trust Co.*, 311 U.S. 494 (1941) where the petitioner had also argued that the jurisdictional point was not contested or adjudicated at the trial. The Court held that whether a particular issue was actually litigated is immaterial in view of the necesary conclusion that there was full opportunity to litigate it; the Court also held that however the issues were labeled the Court was authorized to determine them.

This Court has held that a party is entitled to but one trial and he should have the burden of presenting his entire case at that time. *Grubb v. Public Utilities Commission*, 281 U.S. 470 at 479 (1930). Dufief argues that Hynning,

even if he is correct in saying that subject matter jurisdiction was not explicitly litigated in the first case, had full opportunity to litigate it and it could have or should have been litigated and Hynning is now barred by the doctrine of *res judicata* and collateral estoppel from relitigating the issue. *Chicot County Drainage District v. Baxter State Bank, supra, Jackson v. Irving Trust Co., supra, Chicago, Milwaukee, St. Paul and Pacific Railroad Company v. United States,* 585 F.2d 254 (1978).

In *Stoll v. Gottlieb, supra,* 305 U.S. 171-172, Mr. Justice Reed stated:

> "A court does not have the power, by judicial fiat, to extend its jurisdiction over matters beyond the scope of the authority granted to it by its creators. *There must be admitted, however, a power to interpret the language of the jurisdictional instrument and its application to an issue before the court.* Where adversary parties appear, a court must have the power to determine whether or not it has jurisdiction of the person of a litigant, or whether its geographical jurisdiction covers the place of the occurrence under consideration. *Every court in rendering a judgment tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter."* [Emphasis added.]

Thus a Court, if it obtained the requisite jurisdiction over the defendant, has the power to decide whether it has jurisdiction over the subject matter. *Stoll v. Gottlieb, supra,* 305 U.S. 165. The *Restatement* on Judgments recognizes this:

> "Although the court does not have jurisdiction over the subject matter, it may have jurisdiction

> to determine the question whether it has jurisdiction over the subject matter and to bind the parties by its determination, with the result that thereafter they are precluded from successfully contending that the court had no jurisdiction over the subject matter." *Restatement*, Judgments §10 Comment a (1942).

There is no dispute that the Arlington Court had personal jurisdiction over the partnership. Therefore in rendering its judgment, the Court tacitly, if not expressly, determined that it had jurisdiction over the subject matter and the issue ought not be relitigated. "It is just as important that there should be a place to end [litigation] as there should be a place to begin." *Stoll v. Gottlieb*, 305 U.S. 165 at p. 172 (1938).

3. The judgment below rests on an adequate non-federal basis, *res judicata* and collateral estoppel.

The judgment in the Arlington Circuit Court on March 27, 1979 was based on that Court's finding that Hynning was barred from raising the issue of the validity of the original judgment. The Court found that:

> "A careful reading of the able arguments presented in the prior case indicates that while the issue of subject matter jurisdiction was not phrased in that precise term, the concepts asserted were identical and could not have escaped the attention of the appellate courts. The denial of the appeals in effect confirmed the trial court's determination that it had jurisdiction. It is noted further that the present Complainant is in privity with the Plaintiff in the prior case and it is my judgment that the Defendant is barred in this

action to raise the issue of the validity of the original judgment."

That judgment then rests on a decision that the question in issue is *res judicata* and therefore does not present a federal question. The question of *res judicata* is one of general law and not one that depends upon the Constitution, treaties or statutes of the United States. *The City and County of San Francisco v. Itsell*, 133 U.S. 65 (1890), *Beals v. Cone*, 188 U.S. 184 (1903). The denial of a Writ of Certiorari by the Supreme Court has no value as precedent but that denial does signify that appellate review had been exhausted, that the parties had their day in Court and that the case could be *res judicata* in a subsequent action. *Deane Hill Country Club, Inc. v. City of Knoxville*, 379 F.2d 321 (6th Cir. 1967).

4. The Virginia Statute allowing service of process on one partner to give the Court jurisdiction of the partnership is Constitutional under Section I of the Fourteenth Amendment to the Constitution of the United States.

A partnership has been defined in the Uniform Partnership Act as "an association of two or more persons to carry on as co-owners, a business for profit." §50-6, Code of Virginia (1950), as amended.

Even after the adoption of the Uniform Partnership Act, the jurisdictions are divided as to whether a partnership is a legal entity distinct from the persons comprising it. 60 *Am. Jr.*2d. Partnerships, § 322,323. In Virginia it is held that a common law partnership is not a separate entity and thus could not sue or be sued in its firm name. The Virginia Court has further held that the Uniform Partnership Act does not require the naming of the partnership as a defendant in a suit against the partners. *McCormick v.*

Romans, 214 Va. 144, 198 S.E.2d 651 (1973). Indeed, the United States Supreme Court, in the case of *Great Southern Fire Proof Hotel Company v. Jones*, 177 U.S. 499, (1900), held that with regard to jurisdiction of the United States Court based on the diversity of citizenship of the parties, the Court must look to the citizenship of the persons composing a partnership association, even though such association may have some of the characteristics of a corporation.

In an effort to overcome the nebulous character of partnerships, many jurisdictions, including Virginia, have enacted statutes that provide that in actions against members of partnerships, service of process upon one of the partners is service on all and that service of process on one of the partners gives the Court jurisdiction over the partnership. 60 *Am. Jur.*2d, Partnerships, §330.

The Code of Virginia (1950), as amended, § 8-59.1, provides as follows:

> "Process against, or notice to, a copartner or partnership may be served upon a partner and it shall be deemed service upon the partnership and upon each partner individually named in the action, provided the person served is not a plaintiff in the suit, and provided the matter in suit is a partnership matter."

Hynning has conceded that he was a general partner in the partnership and thus, under the Virginia Statute, service upon him sufficed to give Virginia jurisdiction over both Hynning and the partnership, *The Caravel Office Building Company*.

This Court has approved a statute similar to Virginia's in the case of *Sugg v. Thornton*, 132 U.S. 524 (1889), which involved a suit in Texas by Mr. Thornton against

several defendants, including a partnership composed of E.C. Sugg, a resident of Texas, and Iker Sugg, a resident of Wyoming. The Texas Statute stated:

> "Art. 1224. In suits against partners the citation may be served upon one of the firms, and such service shall be sufficient to authorize a judgment against the firm, and against the partner actually served." (Page 526)

E.C. Sugg was served in Texas and Iker Sugg was served in Wyoming under a Texas Statute which allowed constructive service out of state upon a non-resident. The United States Supreme Court upheld the Texas Statute providing for a judgment against the resident partner and the partnership assets only. The *Sugg* case is identical to our present case also in that the non-resident partner appeared and challenged the judgment on the merits and having lost on the merits, the United States Supreme Court held that he could not then contest the proceedings on the grounds that the Court had no jurisdiction over him.

Various state courts have held that service of process on one partnership is sufficient to give the Court jurisdiction over the partnership. *Hibou v. Ramsing,* (Del. Super, 1974) 324 A.2d 777; *Diamond National Corp. v. Thunderbird Hotel, Inc.*, 85 Nev. 271, 454 P.2d 13 (1969); *Fidelity and Casualty Company of New York v. Homan,* (Fla. App. 1959) 116 So.2d 444 and other cases cited at 60 *Am. Jur.*2d, Partnerships, §330.

In *Hibou v. Ramsing, supra,* the Delaware Court held that even though the non-resident partnership did not do any business in Delaware, service upon a resident partner was sufficient to constitute service upon the partnership. *Hibou v. Ramsing,* at p. 782.

In *Fidelity and Casualty Co. of New York v. Homan, supra,* the Florida Court upheld a statute that allowed service upon one partner to be valid service upon the partnership. That statute, as Virginia's, made no distinction as to whether the defendants or their partnership were residents or non-residents. The partnership involved was a Pennsylvania partnership with no contacts in Florida other than the fact that one partner resided in Florida. The partnership obligation was incurred in Pennsylvania. The Court held that service upon the Florida partner was sufficient to give the Court jurisdiction over the partnership. The Court based its decision on the fact that both Florida and Pennsylvania hold that a partnership is not a separate legal entity apart form the individuals who comprise it. *Fidelity, supra,* at p. 447. The law in Virginia is also that a partnership is not a separate legal entity.

It is also interesting to note that the defendant partner in *Fidelity* conceded that the Florida Court had jurisdiction over the subject matter – i.e., that the Court had general jurisdiction over actions for breach of contract. Therefore, the question was basically one of jurisdiction over the person. *Fidelity,* p. 446.

In his appeal Hynning had cited a line of cases running from the landmark decisions of *Pennoyer v. Neff,* 25 U.S. 714 (1878) and *International Shoe Company v. State of Washington,* 326 U.S. 310 (1945) through the recent case of *Shaffer v. Heitner,* 433 U.S. 186 (1977). Dufief has no quarrel with the legal principals enunciated in these cases but contends that Appellant's reliance on them is sorely misplaced when considered in light of our present case. The cases relied upon by Appellant all involved the forum Court attempting to exercise personal jurisdiction over non-resident defendants by means of constructive service outside the forum jurisdiction. In our present case we have actual, valid substituted service on the general partner of

the defendant partnership, who is domiciled in the State of Virginia, and because partnerships are not a separate legal entity apart from the partners, that is sufficient to give the Court jurisdiction over the partnership.

In that case of *Milliken v. Meyer*, 311 U.S. 457, the Supreme Court held that:

> "Domicile in the state is alone sufficient to bring an absent defendant within the reach of the state's jurisdiction for purposes of a personal judgment by means of appropriate substituted service. Substituted service insuch cases has been quite uniformly upheld where the absent defendant was served at his usual place of abode in the state." (Page 462)

See also 62 *Am. Jur.*2d, Process, § 69; 126 ALR 1474. Therefore, it is Dufief's contention that Virginia's Statute on Service of Process is Constitutional.

CONCLUSION

Appellee Dufief respectfully submits that for the reasons set out above, Appellant presents no substantial question for the decision of this Court and therefore, this Honorable Court should dismiss this appeal.

Respectfully submitted,

GRIFFIN T. GARNETT III
Attorney for Appellee
GARNETT, KOSTIK & GARNETT
2000 North 16th Street
Arlington, Virginia 22216

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the aforesaid document were on this 21st day of August, 1980, mailed, first class postage prepaid to: Frank E. Brown, Jr., Counsel for Appellant, Barham, Radigan, Suiters & Brown, P.C., 2009 North 14th Street, Suite 410, Arlington, Virginia 22216.

GRIFFIN T. GARNETT III
Attorney for Appellee
GARNETT, KOSTIK & GARNETT
2000 North 16th Street
Arlington, Virginia 22216